Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ELLIS L. McDONALD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Racketeer Influenced and Corrupt Organizations (RICO) statute, do separate patterns of racketeering activity involving the same enterprise constitute separate violations of 18 U.S.C. Section 1962(c), and therefore separate offenses?

2. Where a violation of 18 U.S.C. Section 1962(c) is charged, does Rule 8(b) of the Federal Rules of Criminal Procedure permit the joinder of separate patterns of racketeering activity, involving the same enterprise and different defendants, in one count of an indictment?

3. Where a violation of 18 U.S.C. 1962(c) is charged, and the enterprise is a legitimate business, does a pattern of racketeering activity exist when the acts of racketeering activity are related to the enterprise, but the acts are not related to each other?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were the petitioner Ellis L. McDonald, his codefendants Lambert C. Mims, Charles S. Shaw, and Francis A. Wilke, Jr., and the respondent United States of America. At this time, only petitioner Ellis L. McDonald seeks review by this Honorable Court; however, the interests of petitioner's codefendants may be affected by that review.

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Your petitioner Ellis L. McDonald respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on December 15, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is unpublished, and will not be reported. It is reprinted as Appendix A in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was rendered on December 15, 1993, and this petition is filed within ninety (90) days of said date. The

jurisdiction of this Honorable Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Title 18 U.S.C. Section 1961 et seq., entitled "Racketeer Influenced and Corrupt Organizations." The provisions involved are lengthy, and their pertinent text is reprinted as Appendix B in the appendix hereto.

RULES OF COURT INVOLVED

Rule 8(b) of the Federal Rules of Criminal Procedure. Said rule reads:

> "Rule 8. Joinder of Offenses and of Defendants.
>
> ". . . .
>
> "(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

STATEMENT OF THE CASE

Petitioner McDonald was indicted by the United States Grand Jury for the Southern District of Alabama, and charged with numerous violations of federal law in a thirty-six count indictment. This constituted the basis for federal jurisdiction in the district court. The indictment is reprinted as Appendix C ir the appendix hereto. In addition to the defendants who were parties to the proceedings in the court below, the indictment charged three other persons who became government witnesses or otherwise were not involved in the appeal to the Eleventh Circuit.

Count one charged McDonald, Lambert C. Mims and F. Lee Jackson with conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. Section 1962(c). Five predicate acts of racketeering were alleged, which corresponded to five substantive offenses charged elsewhere in the indictment. Counts two, three and four concerned Hobbs Act extortion which involved the proposed construction of a steam plant, a facility which would generate steam for use as energy by burning solid waste. Count two charged McDonald, Mims and Charles S. Shaw with a Hobbs Act conspiracy. Count three named these three defendants in a substantive Hobbs Act extortion, while count four charged McDonald and Mims with a separate substantive Hobbs Act extortion.

Counts five through twenty-one concerned the defrauding of Scott Paper Company through inflated billings which involved the use of the mails. Count five charged McDonald, Jackson, and Michael Taylor with an 18 U.S.C. Section 371 conspiracy to defraud Scott Paper Company through the use of the mails. Count six charged McDonald, Jackson, Taylor, and William E. Cullum with a substantive act of mail fraud, in violation of 18 U.S.C. Section 1341. Counts six through twenty-one charged Jackson and Taylor with substantive acts of mail fraud.

Counts twenty-two through twenty-six dealt with the defrauding of the Mobile Water Service System through the use of the mails by means of bid rigging and kickbacks. Count twenty-two charged McDonald, Jackson, and Francis A. Wilkie with an 18 U.S.C. Section 371 conspiracy in this regard. Counts twenty-two through twenty-six charged McDonald, Wilkie and Jackson with substantive acts of mail fraud.

Count twenty-seven charged McDonald with obstruction of justice for attempting to induce Cullum to give false testimony in Cullum's forthcoming trial on criminal

tax charges. Counts twenty-eight through thirty-five charged various tax offenses against McDonald. Count thirty-six was a forfeiture count, which is not germane to the issues here presented.

The enterprise designated in the RICO count was Campbell Construction Engineers, Inc. (CCEI). CCEI was an entirely legitimate business owned by McDonald, which engaged in various forms of contracting work.

The following schematic will assist the reader in understanding the nature of the joinder of offenses and defendants in this case:

Offense	Count Number	Defendants
	COUNT 1	
RICO—18 U.S.C. 1962(c)		McDonald, Mims, Jackson
Racketering Predicate Acts		Corresponding Count(s) of indictment
1. Mail fraud		23 through 26
2. Hobbs Act extortion		3
3. Hobbs Act extortion		4
4. Mail fraud		6 through 21
5. Obstruction of justice		27
	The Steam Plant Counts	
	COUNT 2	
Hobbs Act conspiracy		McDonald, Mims, Shaw
	COUNT 3	
Hobbs Act extortion		McDonald, Mims, Shaw
	COUNT 4	
Hobbs Act extortion		McDonald, Mims
	The Scott Paper Company Counts	
	COUNT 5	
Mail fraud conspiracy		McDonald, Jackson, Taylor
	COUNT 6	
Mail fraud		McDonald, Jackson, Taylor, Cullum
	COUNTS 7-21	
Mail fraud		Jackson, Taylor

The Mobile Water Service System Counts

COUNT 22

Mail fraud conspiracy	McDonald, Jackson, Wilkie

COUNTS 23-26

Mail fraud	McDonald, Jackson, Wilkie

The Tax-Related Counts

COUNT 27

Obstruction of justice	McDonald

COUNTS 28-35

Conspiracy to defraud the IRS; filing false tax returns; tax evasion	McDonald

McDonald was convicted of counts one, four, five, six, twenty-two, twenty-three, twenty-seven, and twenty-nine through thirty-five. He was acquitted on counts two, three, twenty-four, twenty-five, and twenty-six.

McDonald moved to sever counts two, three and four (which also constituted the steam plant predicate acts) from the remainder of the indictment, which motion was denied by the district court.

The evidence adduced at trial demonstrated that the only commonality amongst the steam plant racketeering predicate acts, and the Scott Paper Company/Mobile Water Service System racketeering predicate acts, was that they were in some way related to the enterprise, CCEI. The object of the steam plant predicate acts (Hobbs Act extortion, through the use of political influence) was for CCEI to be awarded to contract to construct the steam plant. The Scott Paper/Water Service predicate acts (mail fraud) involved inflated billings, bid rigging and kickbacks on contracts which CCEI had with Scott Paper and the Water Service. In all other respects, the two sets of predicate acts were dissimilar.

McDonald was the only participant in both sets of predicate acts; other than McDonald, the two sets of predicate acts involved totally different actors. The vic-

tims in both sets of predicate acts were different. Totally different criminal statutes were involved in the two sets of predicate acts. The purposes and methods of commission of the two sets of predicate acts were also totally different. The steam plant predicate acts involved efforts to obtain *legitimate* business, through the means of extortion, while the Scott Paper/Water Service predicate acts involved efforts to obtain *dishonest* monies through fraudulent billing and the like. Moreover, the eventual results of the predicate acts were different. With respect to the steam plant acts, McDonald was unsuccessful—the attempted extortion did not work, and no legitimate business was obtained. However, with respect to the Scott Paper/Water Service predicate acts, the fraudulent schemes were eminently successful in obtaining illegitimate monies. Furthermore, the steam plant extortion was limited in time to the initial stages of the proposal for construction of the facility, while the mail fraud was a continuous scheme which repeated itself constantly over an extremely lengthy period of time.

It should be noted here that the obstruction of justice predicate act was related only to the tax counts of the indictment, which named McDonald as the sole defendant. The tax counts concerned the laundering of unreported monies out of CCEI, for McDonald's benefit; the government contended that these laundered monies represented the proceeds of the Scott Paper/Water Service mail frauds.

In the Eleventh Circuit Court of Appeals, McDonald contended that separate patterns of racketeering activity involving the same enterprise constitute separate violations of 18 U.S.C. Section 1962(c), and therefore separate RICO offenses. McDonald further argued that the steam plant predicate acts constituted one pattern of racketeering activity, while the Scott Paper/Water Service predicate acts constituted an entirely separate pattern of racketeering activity. As such, McDonald con-

tended that two separate RICO offenses were improperly joined in one count of the indictment. Since the RICO count permitted the joinder of the steam plant counts and the Scott Paper/Water Service counts in one indictment, McDonald argued that this resulted in an improper joinder of defendants under Rule 8(b), Fed.R.Crim.Proc. McDonald also argued that the steam plan ar ! Scott Paper/Water Service predicate acts did not form a patter, of racketeering activity because the two sets of predicate acts were not related to one another, but only to the enterprise, CCEI. The Eleventh Circuit summarily rejected these contentions.

REASONS FOR GRANTING THE WRIT

I. AND II.

THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

18 U.S.C. Section 1962(c) provides, "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." The issue of whether separate patterns of racketeering activity involving the same enterprise constitute separate violations of Section 1962(c), and therefore separate RICO offenses, impacts profoundly upon the joinder provisions of Rule 8(b) of the Federal Rules of Criminal Procedure.

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 106 L.Ed.2d 195, 109 S.Ct. 2893 (1989), this Court held that RICO's pattern requirement consists of two elements: continuity and relationship. Continuity is not at issue in this case. The *H.J. Inc.* Court concluded that racketeering acts are related, within the meaning of the pattern requirement, if they "[H]ave the same or similar purposes, results, participants, victims, or methods of

commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 492 U.S. at 240, 106 L.Ed.2d at 208 (internal quotation marks omitted). Although the various courts of appeals have since utilized this test on numerous occasions to determine whether or not a *single* pattern of racketeering activity existed, there appears to be no court which has utilized it to determine whether *separate* patterns were established. Indeed, there are no published decisions of the courts of appeals which deal with the issue of whether, for *joinder* purposes, separate patterns of racketeering activity constitute separate RICO offenses. The courts of appeals have, however, faced this question in the double jeopardy context, before the *H.J. Inc.* decision was rendered, and have answered it affirmatively.

Several courts of appeals have held that where there are separate patterns of racketeering activity involving the same enterprise, separate RICO offenses have been committed, with the result that there is no double jeopardy bar to the successive prosecution of both patterns/offenses. *U.S. v. Dean*, 647 F.2d 779, 785-788 (8th Cir. 1981), modified *en banc* on other grounds, 667 F.2d 729 (8th Cir. 1981); *U.S. v. Langella*, 804 F.2d 185, 188-189 (2nd Cir. 1986); *U.S. v. Ciancaglini*, 858 F.2d 923, 927-29 (3rd Cir. 1988); *U.S. v. Russotti*, 717 F.2d 27, 32-34 (2nd Cir. 1983). The Eleventh Circuit itself has also so held, in *U.S. v. Ruggiero*, 754 F.2d 927, 931-33 (11th Cir. 1985).

These opinions reasoned that the evil Congress sought to address "[W]as the use of a pattern of racketeering activity as a means of operating an enterprise." *Dean*, 647 F.2d at 787. Consequently, each distinct pattern of racketeering activity constitutes a separate unit of prosecution—that is, a separate RICO offense. *Id.* This logic is supported by this Court's opinion in *United States v. Turkette*, 452 U.S. 576, 69 L.Ed.2d 246, 101 S.Ct. 2524 (1981), wherein the Court held that the terms "enter-

prise" and "pattern of racketeering activity" are entirely discrete concepts. In reaching this conclusion, the Court stated:

> "In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' "

452 U.S. at 583, 69 L.Ed.2d at 254. Although *Turkette* does not specifically so hold, the above-quoted statement infers that each separate pattern of racketeering activity involving the same enterprise will support a separate RICO conviction. It should also be noted that if the courts of appeals are correct in their analysis, their logic necessarily applies not only to double jeopardy issues, but also to issues of improper joinder.

The express language of Section 1962(c) also clearly indicates that Congress intended for each separate pattern of racketeering activity involving the same enterprise to constitute a separate RICO offense. The statute makes it unlawful for any person to conduct the affairs of "any enterprise" through "*a* pattern of racketeering activity." Had Congress intended for different patterns to constitute one RICO offense with respect to the same enterprise, it would have used the plural ("patterns") instead of the singular ("a pattern") in the statute. As the statute was enacted, it creates a unit of prosecution consisting of an enterprise and a single connected pattern of racketeering activity, as opposed to an enterprise and multiple connected patterns of racketeering. The latter approach would focus solely upon the enterprise as an allowable unit of prosecution, and would result in overwhelming joinder problems.

Rule 8(b), Fed.R.Crim.Proc., provides in pertinent part, "Two or more defendants may be charged in the same indictment or information if they are alleged to have

participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It is well established that in order to demonstrate that multiple defendants have engaged in the "same series of acts or transactions," the government must show that the acts alleged are unified "by some substantial identity of facts and/or participants." *See, e.g., U.S. v. Morales*, 868 F.2d 1562, 1569 (11th Cir. 1989); *U.S. v. Wilson*, 894 F.2d 1245, 1253 (11th Cir. 1990). The requirement of substantial identity between facts and/or participants "is designed to prevent joinder of separate and unrelated offenses in multiple defendant situations." *U.S. v. Butera*, 677 F.2d 1376, 1384 (11th Cir. 1982).

There is no question but that the RICO statute permits more extensive joinder of defendants and offenses than would otherwise be allowable. However, if separate RICO patterns can be joined in the same count of one indictment, Rule 8(b) has effectively been abrogated, and all manner of disparate offenses and unrelated defendants can be cobbled together without the requisite substantial identity between facts and/or participants. This is precisely what occurred in the case at bar. The steam plant predicate acts and the Scott Paper/Water Service predicate acts constituted two separate patterns of racketeering activity. The steam plant counts involved three defendants and an extortion scheme, while the Scott Paper/Water Service counts involved an entirely unrelated mail fraud scheme and five defendants; only one defendant—McDonald—was a participant in both schemes.

The ultimate consequence of a conclusion that separate patterns of racketeering activity involving the same enterprise constitute but one offense, will be a "rule" that totally unconnected offenses and defendants can be joined for the sole reason, without more, that they have some relationship to the same RICO enterprise. Of course, this would be no rule at all, since it would amount to the repeal of Fed.R.Crim.Proc. 8(b).

The courts of appeals have never addressed the precise issue before this Court, and have never addressed this issue in any context since *H.J. Inc., supra,* was decided. *H.J. Inc.'s* definition of the relationship between predicate acts provides the ideal vehicle for delineating between separate patterns of racketeering activity. The RICO statute is ever-increasingly used by prosecutors, and that statute continues to be expansively interpreted by the lower courts. Treating separate racketeering patterns involving the same enterprise as one RICO offense expands the statute to the bursting point. It is respectfully submitted that the writ of certiorari should be granted, in order that this Court can, in light of its decision in *H.J. Inc.,* provide guidance to the courts of appeals on the issue of whether separate patterns of racketeering activity involving the same enterprise constitute separate RICO offenses for joinder purposes under Fed.R.Crim.Proc. 8(b).

III.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

As was noted above, in *H.J. Inc. v. Northwestern Bell Telephone Co., supra,* this Court defined the relationship requirement of a pattern of racketeering activity. The Court held that racketeering acts are related if they "[H]ave the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 492 U.S. at 240, 106 L.Ed.2d at 208 (internal quotation marks omitted). As the Court specifically observed, this definition speaks "solely" in terms of the relationship of the predicate acts "one to another." *Id.* Plainly, this Court held that the relationship element of the pattern requirement is satisfied only when the predicate acts are related *to one another.* Nowhere did this Court state that the relationship element can be satisfied solely by a predicate act's relationship to the enterprise itself.

As was noted in the preceding statements of the case, the two series of predicate acts in the case at bar bore no relationship to one another; rather, their only common characteristic was a connection to the enterprise itself. The steam plant predicate acts involved the extortion of legitimate income from one victim, while the Scott Paper/ Water Service predicate acts involved the fraudulent obtaining of legitimate income from different victims. The two sets of predicate acts involved totally separate participants, with the sole exception of McDonald. McDonald's extortion was unsuccessful, while the mail fraud scheme was highly successful. The steam plant counts involved extortion by the attempted use of political influence, while the mail fraud counts involved fraudulent deception. The steam plant extortion was a one-time occurrence, temporally limited to the beginning stages of the proposal for the construction of the facility, while the mail fraud was an ongoing scheme which repeated itself over an extensive period of time. In point of fact, the steam plant extortion was an isolated occurrence. The *only* connection between the extortion and mail fraud predicate acts was not some relationship to one another, but their relationship to the enterprise, since they were all undertaken either through or for the purpose of benefiting the enterprise, CCEI.

If the mere relationship of racketeering acts to a legitimate business such as CCEI, without more, suffices to create a pattern of racketeering activity, there is no limit to the number of unrelated offenses and defendants which can be joined in one indictment whenever a RICO violation is alleged.

At this juncture, it should be noted that in the context of organized crime, the connection of predicate acts to an enterprise can supply the requisite relationship between the acts, since the business of organized crime is—by definition—crime. As such, no matter how otherwise disparate, racketeering acts can be related because they are

simply individual manifestations of the way in which an organized crime enterprise carries on its normal business. In such a scenario, the racketeering acts are linked to each other in satisfaction of the *H.J. Inc.* requirement that the relationship between acts must be determined solely upon their connection "one to another." These considerations are not present where a legitimate business, such as CCEI, is concerned.

It should also be noted that the Second Circuit Court of Appeals has made the conclusory statement that "[T]wo racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is relatd to the RICO enterprise." *U.S. v. Indelicato,* 865 F.2d 1370, 1383 (2nd Cir. 1989); *U.S. v. Minicone,* 960 F.2d 1099, 1106 (2nd Cir. 1992). Although this language was used with reference to RICO enterprises which were constituted by organized crime families, the ominously broad sweep of that language illustrates the nature of the problem.

The decision of the Court of Appeals for the Eleventh Circuit flatly conflicts with this Court's decision in *H.J. Inc.* The writ of certiorari should issue for that reason, and in order for this Court to unequivocally state the nature of the necessary relationship between predicate acts in the context of legitimate businesses which are alleged to be RICO enterprises.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted, and this cause remanded to the Eleventh Circuit Court of Appeals for appropriate disposition.

Respectfully submitted,

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